Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-869

ALBERT DEFALCO,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EMIL OXFELD
ROTHBARD, HARRIS & OXFELD
744 Broad Street
Newark, New Jersey 07102
(201) 642-0161
Attorney for Petitioner

FREDERIC J. GROSS
On the Petition

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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Petitioner, Albert DeFalco, respectfully prays a writ of certiorari issue to review the judgment of he United States Court of Appeals for the Third Circuit, affirming his conviction after jury trial in the District of New Jersey for conspiring to and impersonating a federal employee.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit rendered no opinion, instead disposing of petitioner's appeal by Judgment Order. A copy of that Judgment Order, to-

gether with a copy of that Court's Order denying petitioner's motion to stay the issuance of the Court's judgment, are reproduced in the Appendix at pages A 1 and A 4, respectively.

JURISDICTION

Petitioner was convicted after jury trial in the District of New Jersey on the first three and last counts of a fourteen count indictment. He is serving a six year sentence.

The decision of the United States Court of Appeals for the Third Circuit affirming petitioner's conviction was entered on October 8, 1976. By Order dated November 1, 1976, the mandate of that Court was stayed until November 7, 1976, "without prejudice to the right of appellant to proceed under 28 U.S.C. 2255, where a record may be made in the district court, or to file a petition for rehearing en banc as to issues presented on this appeal." On November 16, 1976, a petition for a rehearing, which had been limited to the question whether petitioner received effective assistance of counsel on appeal, was denied.

On December 10, 1976, Mr. Justice Brennan extended the time within which to file this Petition to and including December 24, 1976.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. When petitioner was denied the effective assistance of counsel on appeal by reason of counsel's preparing and submitting an incoherent brief that displays no familiarity with the defense's case, counsel having secretly negotiated his own guilty plea to a related indictment while the appeal was pending, and these matters were made known to the Circuit Court of Appeals in a timely Petition for Rehearing, did that Court err in refusing to vacate its judgment affirming petitioner's conviction?

2. Where the figure central to the charged conspiracy was awaiting sentencing after pleading guilty, did the prosecution's refusal to elicit his testimony entitle the defendant to an 'uncalled witness' instruction?

STATUTES INVOLVED

This case presents questions touching upon the Fifth and Sixth Amendments to the United States Constitution, the All Writs Act (28 U.S.C. 1651(a)), and Title 28, Section 2255 of the United States Code. The texts of these authorities, together with the Conspiracy (18 U.S.C. 371) and False Personation (18 U.S.C. 912) statutes under which petitioner was indicted, are reproduced in the Appendix (A5-7).

STATEMENT OF THE CASE

Albert DeFalco (petitioner), Ronald Blackwell and four others were indicted on June 11, 1975 in the District of New Jersey.

They were charged in Count One with conspiring (18 U.S.C. 371) to defraud the Immigration and Naturalization Service (INS) (18 U.S.C. 912) and to impersonate a federal officer (18 U.S.C. 912) both by acting "as such" and by demanding and obtaining money through said personation. All six were also charged with thirteen substantive counts of obtaining money through impersonation (18 U.S.C. 912) or aiding and abetting same (18 U.S.C. 2). 1/

A. Blackwell, the Uncalled Witness

The grand jury charged that the conspirators acted to obtain payments from illegal aliens 2/ in return for influencing

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1/ The indictment was hardly an exemplar of draftsmanship. It related twelve overt acts by a stranger to the conspiracy. It was repeatedly and substantively redacted before the conspiracy charge and three of the substantive charges were submitted to the jury. Although some redactions were designed to prevent the jury from learning of the co-defendants' guilty pleas, others were responses to wholesale failures to produce competent evidence, or shifting theories of the conduct that offended.

2/ At trial, no competent evidence was produced, and no instructions were given, as to the "illegal" status of any alien. Counsel on appeal, however, never questioned whether this might constitute a fatal vari-

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a Member of Congress to introduce private bills. If any of the bills had passed, it would have entitled the beneficiary to obtain permanent residence in this country. To justify passage of the bills, the conspirators allegedly urged the aliens to submit false statements of hardship for consideration by the House Judiciary Committee. 3/

2/ continued from previous page.

ance between charge and proof.

3/ The indictment fails to describe how the INS was to be defrauded. The prosecution vacillated among five different theories: petitioner impersonated an INS official; petitioner exacted fees to represent a group of aliens at an aborted surrender en masse to INS; the House Judiciary Committee passed false hardship statements to the INS; false hardship statements were solicited for direct submission to INS in support of political asylum applications; and advising aliens to circumvent INS procedures through requests for private legislation. No evidence was adduced as to the first three of these theories; the evidence as to the fourth was fragmentary; the fifth entails petitioning the Congress, a constitutionally protected activity. The petit jury, nonetheless, specially found a conspiracy intent on defrauding the INS.

Twelve of the substantive counts charge Blackwell with receiving money from Chileans. The prosecution theory was that Blackwell shared these payments with its star witness, one Aguirre,4/ and with Mr. DeFalco. The remaining count charges petitioner with demanding and receiving money from the Argentinians, "Maria and Luis Echavarria, an alien (sic) residing illegally in the United States."

4/ Aguirre, an unindicted co-conspirator, testified under a grant of immunity. Before the grand jury, Aguirre testified in Spanish. His trial testimony was rendered in extremely broken English. At times, Judge Lacey commiserated with trial counsel's inability to meaningfully cross-examine the witness. But neither counsel nor the Court insisted that Aguirre's testimony be received through translation.

Aguirre's credibility is highly questionable. He insisted that the only false element of a hardship statement he submitted was his claim to have been a "secretary to" a losing candidate for the Chilean presidency. He testified he was merely the secretary to the candidate's secretary, or perhaps the secretary to the secretary to the candidate's secretary. Professor Birns, an expert witness for the defense, upon questioning out of the jury's presence, cast substantial doubt on almost every element of

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Blackwell and three others entered guilty pleas to the conspiracy charge one week before petitioner's jury trial commenced. None had been sentenced at the time petitioner's trial began; none testified at the trial. The remaining defendant, one Varas, is a fugitive.

According to the prosecution, Blackwell was an executive in a manufacturing plant which employed large numbers of illegal aliens. Weekly INS raids had jeopardized production. Blackwell was approached by an employee, Aguirre, who sought assistance in obtaining a certification from the Department of Labor. Certification would facilitate receipt of permanent resident alien status. Aguirre agreed to pay Blackwell $1500 for his efforts.

4/ continued from previous page.

Aguirre's claim to have been a major political figure in pre-Allende Chile. The court limited the expert's testimony, so that the jury only knew that an Aguirre affidavit was notarized six months prior to events it describes, and that the letter of commendation exhibited by Aguirre was not personally signed by the Chilean presidential candidate.

Aguirre and Blackwell later altered their agreement. For an additional $1000, Blackwell would instead arrange for introduction of a private bill in Congress. Pursuant to the modified agreement, Aguirre was introduced to petitioner at Blackwell's home. There, petitioner was understood to claim that he knew people in INS and worked for the Honorable Henry Helstoski, United States Representative for the Ninth District of New Jersey. Aguirre then gave Blackwell $1500 in cash, as a down payment. He expected to pay another $500 for the private bill, and the final $500 upon receipt of his "green card". 5/

Soon, Aguirre's arrangement with Blackwell was again modified. He stopped being a victim and became an accomplice. He was to introduce paying aliens to Blackwell, and he did that quite well. He produced a small stream of Chileans, who all paid hundreds of dollars to Blackwell. 6/ Aguirre was to be credited with $100 for each victim he recruited. The payments were supposedly made in reliance upon petitioner's ability, as a member of Congressman Helstoski's staff, 7/ to obtain introduction of private bills. Such bills were in fact introduced, but were invariably killed in committee.

5/ "Green card" is the popular term for INS form 1151, the certificate of permanent resident alien status.

6/ Apparently, some of these payments were financed by Varas, the fugitive co-conspirator, who is a Chilean loanshark.

7/ Mr. DeFalco had formerly been so employed, and no doubt this was made known to

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None of the Chileans claimed to have paid Mr. DeFalco any money to influence Congressman Helstoski. All made their cash payments to Blackwell. 8/ Thus, Blackwell's role in any wrongdoing was central. The jury was instructed that "the government's case is founded on...a building block, namely, that the aliens did pay money to Blackwell". Blackwell, however, was not called as a prosecution wit-

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the Chileans. But the English language ability of the aliens was rudimentary at best. And it is undisputed that Mr. DeFalco never spoke to them in Spanish. Consequently, no rational jury could be certain beyond all reasonable doubts that Aguirre, or any other affected alien, accurately heard petitioner use the present, not the past form of "work" in describing his relation to the Congressman. Yet impersonation is the gravamen of every federal offense charged. Cf. United States v. Feola, 420 U.S. 671 (1975). Guilt or innocense ultimately turns upon the ability of these aliens to distinguish between the curriculum vitae of a lobbyist, and the false representations of a confidence artist. The pertinent distinction is embodied in the subtle sonic difference between "work" and "worked" -- a difference that plagues most late-in-life learners of English.

8/ The prosecution claims that Blackwell was later cut out, and Aguirre sent Chileans

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ness, 9/

At the close of the prosecution's case, defense counsel alerted the Court 10/ that he would request a "missing witness" instruction: the failure to call Blackwell raises a presumption that Blackwell's testimoney would have hurt the prosecution's case. The court later asked why the defense wouldn't call Blackwell as its own witness. Counsel replied that only the most foolhardy would call as a defense witness an individual who was awaiting sentence. He sug-

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8/ continued from previous page.

directly to petitioner. No Chileans were named as victims of a Blackwell-less conspiracy.

9/ The evidence as to the final count in no way implicates Aguirre, Blackwell, or any other named co-conspirator except petitioner. It is not summarized here because it does not pertain to the questions presented. See Supreme Court Rule 23(1)(e).

10/ Trial counsel was following the salutary New Jersey practice, recommended in State v. Clawans, 38 N.J. 162, 183 A.2d 77 (1962).

gested the witness might give testimony slanted in favor of the prosecution, in hopes of obtaining a recommendation for a lenient sentence. 11/ As a practical matter, until sentence was imposed, Blackwell would be in the peculiar control of the government. 12/

The trial judge ruled that no missing witness instruction would be given. He felt he had no discretion in the matter, because under United States v. Restaino, 369 F.2d 544, 547 (3d Cir. 1966), co-conspirators who plead guilty do not thereby become favorably disposed toward the government.

11/ The transcript of the hearing at which Blackwell withdrew his prior plea and admitted guilt to the conspiracy charge establishes that Blackwell had received no promise respecting a sentence recommendation.

12/ Counsel had also argued that the prosecution's exclusive access to the grand jury transcript fortified its peculiar power over Blackwell's potential testimony. Blackwell did testify to the grand jury, but trial counsel was not given the transcript. Therefore the prosecution, and only the prosecution, was equipped to impeach Blackwell should his defense-sponsored trial testimony be inconsistent with his grand jury testimony. If the prosecution were to sponsor Blackwell's trial testimony, the

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Judge Lacey did, however, permit the prosecutor to argue the unproved fact that Blackwell lacked independent knowledge of private legislation, urging the inference that petitioner must have taught him in furtherance of a conspiracy. By so arguing, the onus of Blackwell's absence was placed on petitioner, when it should have fallen on the prosecution.

B. The Defense Case: What The Third Circuit Never Knew

The defense theory was developed primarily through petitioner's testimony. Mr. DeFalco asserted that Blackwell had solicited him to serve as a labor and immigration consultant to the firm that employed Blackwell. The firm wanted the benefit of the expertise Mr. DeFalco had developed while formerly employed by Congressman Helstoski.

Petitioner testified that after leaving the Congressman's staff, he had never represented himself as an INS, congressional, or other federal employee. He

12/ continued from previous page

defense would receive the grand jury transcript under the Jencks Act (18 U.S.C. 3500). The opposed parties would then be equally able to impeach by prior inconsistent statement.

explained that in his experience, private bills were usually placed in the congressional hopper at the instance of a private sponsor on behalf of the beneficiary alien. He asserted that Aguirre was the sole Chilean he had agreed to introduce to Congressman Helstoski. He had done so because he credited Aguirre's exaggerated claim to have been marked for persecution by the pro-Communist Allende regime. 13/ Aguirre was the sponsor in fact of all of the other Chileans.

Petitioner denied any timely knowledge that Blackwell and Aguirre were exacting large fees from individual aliens. He denied knowledge that any fees were paid in reliance upon representations that he was a federal employee, or in expectation that legislation was being purchased.

Petitioner acknowledged being the private sponsor who brought the Echavarrias' hardship to the attention of Congressman Helstoski. But he adamantly denied Mrs. Echavarria's claim that he demanded large cash payments or threatened her with physical harm. Mr. Echavarria, who was a party to the alleged transactions, was another of the prosecution's many uncalled witnesses.14/

13/ Congressman Helstoski gave corroborating testimony.

14/ The court permitted Mrs. Echavarria to testify that her husband cashed a check, out of her presence, to pay petitioner. This

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Most significantly, defendant

14/ continued from previous page.

was but one incident in a pattern of prosecutorial abuse tolerated by Judge Lacey.

At the start of the trial, the prosecutor sought permission to list on a blackboard the name of each alien when first mentioned by Aguirre. His stated purpose was to avoid juror confusion among numerous Hispanic names. Permission to do so was granted upon the representation that he intended to call each of those named. In fact, and for no apparent reason, the prosecutor chose to dispense with the testimony of more than half of those whose names with great flourish he had written on the blackboard.

This name game is characteristic of his sense of fairness. It is difficult to fathom a legitimate reason for Aguirre testifying through an interpreter before the grand jury, but presenting his testimony to the petit jury in a species of English that inherently generates questions as to its substance. It is more difficult to understand the prosecutor's convenient forgetfulness with respect to Jencks Act material. On two separate occasions, grand jury transcripts were given the defense on the day major witnesses testified, although the prosecutor had stipulated to earlier dis-

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offered innocent explanations for a var-

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closure. Most difficult to justify is an instance in which the prosecutor effectively testified, and did so misleadingly.

Mrs. Alice English, a secretary to Representative Helstoski, was asked by the prosecutor, "Do you recall [in] 1973 receiving a phone call from Mrs. Echavarria?" The witness had no recollection of the date or name. She did recall a phone call from an agitated woman with a foreign accent. The caller claimed to have paid for a private bill, but her husband nonetheless had been detained by the INS. To refresh her recollection, the prosecutor showed Mrs. English the transcript of her grand jury testimony. The transcript records a line of questions about a call from an unidentified Chilean woman (Mrs. Echavarria is an Argentine national), made at an uncertain date.

Later, Mrs. Echavarria testified that her husband's arrest by the INS in 1973 precipitated her retaining an immigration attorney, rather than calling a Congressman. The attorney suggested she speak to petitioner. Only thereafter did she first make contact with petitioner. Her husband had long since been released. Hence, she could not have been the caller with the detained husband of whom Mrs. English testified. And in fact, Mrs.

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iety of payments received from Blackwell and others. Each of these payments, it should be noted, was made by check. Aguirre insisted that Blackwell only accepted cash; Mrs. Echavarria said the same as to Mr. DeFalco.

Ultimately, the jury was required to make credibility determinations, choosing between Aguirre and Mrs. Echavarria on the one hand, and petitioner on the other. If petitioner were believed, he was the unknowing tool of the Blackwell-Aguirre conspiracy. If he were disbelieved, he was a leading member of the conspiracy.

After substantially redacting the indictment, the trial court submitted the conspiracy and four substantive counts to the jury. Verdicts of guilty to all charges were returned, but judgment n.o.v. was granted as to one substantive count.

14/ continued from previous page. Echavarria testified that she called the congressman's office, and spoke to Mrs. English, in December 1974 or January 1975 -- a full year after the charged conspiracy ended. The sole evidence for a 1973 date was the prosecutor's unsworn testimony. On the basis of his own bald assertions as to the date and caller, the prosecutor convinced the Court that there existed questions of fact for the jury. Was the phone call made in 1973, as he asserted, or in 1974 or 1975, as Mrs. Echavarria testified? Was the 1973 phone call made by Mrs. Echavarria, as he asserted, or by some other party, as is necessarily implied by Mrs. Echavarria's testimony?

C. Verdiramo, Petitioner's Counsel on Appeal

Immediately after notice of appeal was filed, petitioner discharged his trial counsel, 15/ and retained one Vincent Verdiramo to prosecute an appeal from the judgment of conviction. Mr. Verdiramo submitted a brief which, to be charitable, is incoherent. The government's characterization of Mr. Verdiramo's handling of one issue is telling:

> "It is worth noting that in a brief which comprises 48 pages of facts and legal argument, a mere 7½ pages are devoted to appellant's sufficiency argument. Of these 7½ pages, 2 pages argue that the evidence was insufficient as to counts on which the district judge had granted judgments of acquittal; 1 page recites, without disputing, the damaging testimony of Mrs. Echavarria; and one page sets forth the standard or review."

15/ Mr. DeFalco had attempted to substitute counsel on the eve of trial. He stated that he was motivated by a lack of confidence, growing out of trial counsel's repeated efforts to initiate plea bargaining notwithstanding petitioner's protestation of innocence. He also expressed concern that counsel had not adequately investigated the underlying facts. The Court denied petitioner's application, notwithstanding trial counsel's own reservations. Given this background, it is no

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The defense theory of the case cannot be discovered by reading Mr. Verdiramo's brief. His Statement of Facts synopsizes the testimony of the prosecution witnesses--and stops! Only the most careful reading of the brief will alert the reader to the fact that the defendant testified. 16/ Nothing Mr. Verdiramo wrote would alert the reader to the fact that Congressman Helstoski gave testimony that was consistent with Mr. DeFalco's innocence. Nothing in the brief even hints that the expert witness' testimony, limited though it was, raised serious questions as to Aguirre's credibility. Only the most dedicated judge would wade through Mr. Ver-

15/ continued from previous page.

surprise that petitioner obtained new counsel to prosecute his appeal, or that he complained on appeal of trial counsel's failure to pursue certain lines of inquiry. See H.R. Tyler, Jr., Competent and/or Effective: How Breakdowns Occur, 33 NLADA Briefcase 75 (1976).

16/ Mr. Verdiramo let the cat out of the bag only once, when he wrote:

> "In the instant case, the [court's] summarization and comment on the evidence T 1661 to 1696, though liberally sprinkled with admonitions to the jury to let their recollection control,

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diramo's incoherent meanderings, 17/ and come to the appended affidavit of petitioner. In that affidavit, which complains bitterly of the conduct of trial counsel, there are references to the testimony of Representative Helstoski and Professor Birns.

16/ continued from previous page.

> etc., the entire summation is slanted toward the Government's contentions with almost unbelievability accorded to Mr. DeFalco's testimony and of the witnesses who testified on his behalf." (sic)

17/ The court of appeals, after initially scheduling oral argument, cancelled it. This was probably a response to the quality of appellate counsel's performance.

So as to allay any concern that Mr. Verdiramo may here have been quoted selectively, his argument to his first assigned error is reproduced in full at page A 11. Because the presentation of the other eight points is of approximately the same quality, it seems pointless to burden the court and profit the printer with a full reproduction.

Although the reader of that brief is unlikely to realize that a professor, a congressman, and the accused had all given exculpatory testimony, the reader is likely to conclude that Blackwell, the uncalled central figure, did testify. Verdiramo wrote:

> "Blackwell told him [Aguirre] somebody important was coming to Blackwell's house, meaning DeFalco T 96. He discussed his past governmental connections in Chile with DeFalco, the latter then said, "What, me too, I work for the Congressman, I know people in Immigration." T 96. According to Blackwell (sic) and Aguirre this meeting was to obtain a private Bill, while DeFalco maintains it was for labor certifications.T 940" (Verdiramo's emphasis).

Whatever might be the shortcomings in Mr. Verdiramo's brief, they pale in comparison with his personal and professional shortcomings. At the time petitioner retained him, Mr. Verdiramo was already awaiting trial on two separate federal indictments filed in the District of New Jersey. 18/ On June 2, 1976, Verdiramo

18/ Indictment 74 CR 313, filed on August 6, 1974, charged him with conspiracy, obstruction of justice, and illegal sending of electronic surveillance devices; 75 CR 521, filed on December 4, 1975, accused him of conspiracy and mail fraud.

was again indicted in the District of New Jersey. This last indictment charged him, together with Congressman Helstoski and two others, with a variety of offenses relating to the conspiracy for which petitioner stands convicted, and obstruction of the grand jury's investigation into that conspiracy. In particular, Count Six charges Congressman Helstoski with perjuriously denying to the grand jury that he "had received cash and other payments from Albert DeFalco." Count Seven accuses Mr. Verdiramo of conspiring to obstruct the grand jury investigation described in Count Six of the new indictment through "supplying and producing false and misleading testimony and documents." Thus a direct link exists between the crimes charged to counsel and client. On or about September 29, 1976, Mr. Verdiramo entered a plea of guilty to one charge, in the expectation that no other charges would be prosecuted. 19/

Petitioner learned of this one week before his appeal was lost. He thereafter retained his present counsel, who moved the Third Circuit to vacate its judgment, sole-

19/ Thus, petitioner's appeal was pending when the last Verdiramo indictment was returned and his plea entered. Mr. Verdiramo filed the brief a week before the last indictment was announced. After the government responded, more than three months were available for filing a reply. Mr. Verdiramo passed up that last opportunity to faithfully represent petitioner. Instead, he negotiated a plea with the United States Attorney for the District of New Jersey.

ly on grounds of ineffective assistance of counsel on appeal. In opposing petitioner's motion, the United States Attorney glibly extolled Mr. Verdiramo's performance on behalf of petitioner:

> "It is clear from the records of this Court that DeFalco's appeal was competently and vigorously prosecuted."

With equal facility, the United States Attorney avoided any reference to Mr. Verdiramo's guilty plea, or to the underlying bargaining. He did not disclose if and when Mr. Verdiramo testified to the grand jury. He did not reveal that Mr. Verdiramo was charged with offenses growing out of the same conspiracy charged against petitioner. Having withheld from the Court this pertinent information, the United States Attorney urged that petitioner be remitted to his Section 2255 remedy, on the ground that factual determinations would be required. 20/ The Court of Appeals

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20/ For present purposes, there is no need to inquire into the truth of petitioner's sworn allegations that Mr. Verdiramo lied to him about the statuses of petitioner's appeal and of counsel's last indictment. Petitioner's affidavit, which was submitted in conjunction with his application for rehearing, is reproduced at page A 8. Of course, as a procedural matter, the allegations set forth therein must be pre-

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adopted that approach, denying petitioner any relief without prejudice to future habeas proceedings.

20/ continued from previous page.

sumed true, for purposes of determining the proper judicial response.

REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD ISSUE AS TO THE FIRST QUESTION PRESENTED, BECAUSE THE COURT OF APPEALS' FAILURE TO ACT PROMPTLY TO PROTECT THE INTEGRITY OF ITS OWN PROCESS AND PETITIONER'S RIGHT TO A MEANINGFUL APPEAL IS IN APPARENT CONFLICT WITH PRIOR DECISIONS OF THIS COURT, SOUND PRINCIPLES OF JUDICIAL ADMINISTRATION, AND FUNDAMENTAL NOTIONS OF JUSTICE.

The Circuit Court of Appeals has permitted an accused's right to appeal from a judgment of conviction to be subverted and effectively eliminated. The United States Attorney has knowingly stood by, eyes fixed on his conviction ratio, while an indicted attorney with whom he was plea bargaining purported to represent petitioner. Neither of these gentlemen saw fit to timely notify petitioner or the Court of Appeals that counsel labored under a monumental conflict of interest.21/

21/ Simultaneous representation of co-defendants invariably generates a substantial risk that counsel will fail to give a client his undivided loyalty. Glasser v. United States, 315 U.S. 60 (1942). Necessarily, there arises a conflict of interest when one of those defendants is the attorney himself. True, petitioner already stood convicted; counsel

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A. That petitioner was denied the effective assistance of appellate counsel is beyond serious dispute. Whether attention is directed to the shortcomings of counsel's character, or to his obvious conflict of interest, or to the quality of his actual performance, 22/ the conclusion remains constant.

This Court long ago recognized the fundamental importance of the right to counsel in criminal proceedings. Powell v. Alabama, 287 U.S. 45 (1932). It has never doubted that the right to an appeal is the right to a meaningful appeal. Long v. District Court of Iowa, 385 U.S. 192 (1966); Douglas v. California, 372 U.S. 353 (1963). Although the Court has eschewed articulation of precise standards for evaluating the adequacy of representation, see, e.g., Chambers v. Maroney, 399 U.S. 42 (1970), the present case is an appropriate vehicle for demonstrating that the much mooted concern over the quality of advocacy 23/ is not mere rhetoric.

21/ continued from previous page.

was to serve solely as a sword on appeal. But how much did counsel leave unsaid out of deference to his more important client?

22/ A representative sample of Mr. Verdiramo's work product is reproduced at A10. His argument in four of the assigned errors is based on trial counsel's motions.

23/ See, e.g., Burger, The Special Skills of Advocacy, 42 Ford. L.Rev. 227 (1973); Bazelon, Defective Assistance of Counsel, 42 U. Cinn. L.Rev. 1 (1973).

B. The Third Circuit's decision to defer consideration of petitioner's allegations concerning appellate counsel until collateral review under 28 U.S.C. 2255 is clearly wrong. It is wrong because no court should knowingly acquiesce in the perpetration of a fraud in its presence. It is wrong because lower courts should not be burdened with the duty to supervise the conduct of proceedings in reviewing courts. It is wrong because issues which can be reached on direct appeal may well be beyond the reach of a Section 2255 court.24/

At best, the Section 2255 court would order reopening of the appellate proceedings. Chapman v. United States, 469 F.2d 634 (5th Cir. 1972); United States ex rel. Johnson v. Vincent, 370 F.Supp. 379 (S.D.N.Y.) rev'd on other grounds, 507 F.2d 1309 (2d Cir. 1974) cert.denied, 420 U.S. 994 (1975) At worst, it would deny relief. In either event, an appeal would lie from the determination as to the effectiveness of appellate counsel. The result would be needless delay of the day when petitioner is either permitted to appeal his conviction anew, or faced with a final conviction.

24/ Such is probably the case respecting petitioner's claim of entitlement to an "uncalled witness" instruction. The record abounds with indicia of an unfair trial which Mr. Verdiramo either missed

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In all probability, the delays would be further aggravated by the harshness of the rule against piecemeal collateral attacks.25/ Petitioner would have to bring forward all known claims. The district court would be duty-bound to study a ten volume record of trial, attempting to resolve constitutional issues that abound in the present record. But none of that Court's review of the trial record would pertain to the contention that petitioner's right to appeal from his conviction was vitiated by counsel's extraordinary performance.

24/ continued from previous page.

or mangled. Aside from the prosecution's refusal to call Mr. Blackwell, there is a pattern of prosecutorial misconduct: failing to call witnesses after promising to do so as an inducement to an irrevocable ruling, knowingly misleading the jury in the examination of Mrs. English, and shifting with the winds as to the substance of any offense pertaining to the INS. Serious errors are chargeable to the trial court. It gave instructions that are confusing and evidenced deep distrust of the accused and his witnesses in colloquy, comments on the evidence and rulings. It gave questionable rulings as to the forms of the indictment before and after redaction. There are also major qualitative deficiencies in the evidence, particularly with respect to the proof of personation upon which federal jurisdiction is premised.

25/ See 28 U.S.C. 2255 Rule 9(b).

C. The only arguable justification for the course adopted by the court below is the absence of trial facilities in the courts of appeals. Petitioner does not dispute the proposition that the district court is the appropriate forum in which to develop an evidentiary record. Petitioner suggests, however, that in this case the record is already ample.

In any event, the court below overlooked its ability to have a record developed on its own behalf. Exercising its inherent powers to protect its integrity, amply fortified by the All Writs Act (28 USC 1651(a)), it could and should have appointed the district court to sit as a special master. The district court would have been charged with the duty to investigate petitioner's complaints against his counsel on appeal, and to propose findings to the court of appeals. This procedure would have permitted speedy development of a full record, without generating the clutter and potential delay that would necessarily attend Section 2255 proceedings.

D. This Court has had occasion to exhort trial judges "to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." McMann v. Richardson, 397 US 759, 771 (1970). There is no basis in reason or at law for imposing a lesser responsibility on appellate judges.

E. The writ should issue to review the first question presented because this Court has a paramount duty to see that the waters of justice are not polluted. "Pollution having taken place here, the condition should be remedied at the earliest opportunity." Mesarosh v. United States, 352 U.S. 1, 14 (1956).

II.

THE WRIT SHOULD ISSUE AS TO THE SECOND QUESTION PRESENTED IN ORDER TO RESOLVE IMPORTANT RECURRING PROCEDURAL AND SUBSTANTIVE QUESTIONS CONCERNING THE 'UNCALLED WITNESS' PRESUMPTION.

"The production of weak evidence when strong is available, can lead only to the conclusion that the strong would have been adverse." Interstate Circuit, Inc., v. United States, 306 U.S. 208, 226 (1939).

> "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."

Graves v. United States, 150 U.S. 118, 121 (1893).

A. The prosecution suppressed Blackwell's strong testimony in favor of the weaker testimony of Aguirre and his fellow Chileans. Blackwell, and only Blackwell, was a fluent English speaker who had been positioned to know whether petitioner represented himself as presently or previously employed by Congressman Helstoski. The difference would be the difference between guilt or innocence. 26/

Blackwell was the person who received all of the cash the Chileans had paid. Blackwell knew better than any other prosecution witness what he had done with it. Aguirre made the unsupported claim that he saw Blackwell give petitioner an unknown sum of money taken from the ubiquitous black box that accused grafters invariably possess. None of the others then present verified this transaction. Petitioner denied it. Blackwell was best positioned to ascertain the truth and explain the circumstances; Blackwell was best positioned to produce any black box he might own. The prosecutor preferred to have the jury speculate on the facts without benefit of Blackwell's testimony.

26/ The federal jurisdictional nexus of the substantive counts was petitioner's alleged false representation that he worked for the Congressman during 1972 or 1973. Although the conspiracy was found to have acted both to effect this personation and to obstruct or defraud the INS, the evidence as to the INS prong was fragmentary

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Blackwell alone knew the source of his knowledge respecting the availability of private legislation. The prosecutor had no right to invite the jurors to speculate on this matter, when he had earlier refused to provide them with Blackwell's testimony.

This is not a case where the uncalled witness would probably have given only cumulative testimony. "When...there is a sharp issue of fact, failure to produce a witness who would corroborate the party's version can scarcely be regarded as 'merely cumulative.' (sic)" McCormick on Evidence 272 at 656 n.26 (2d ed. 1972). Surely Blackwell was uniquely able to "elucidate the transaction." Graves, supra.

B. It is undisputed that an uncalled witness instruction is only given where a witness is peculiarly within a party's power or control. Interstate Circuit, supra, which was a conspiracy case, stands for the proposition that the central question does not turn on equality of physical access to the prospective witness. 27/

26/ continued from previous page.

and should not have gone to the jury. The singular thrust of the prosecution's case as it was tried went to the personation charges.

27/ If it did, the Compulsory Process clause of the Sixth Amendment would pre-

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Rather, it goes to practical considerations.

> "Such matters as one party's superior means of knowledge... of the testimony that might be expected from him in the light of his previous statements, if any, with reference to the case are to be considered. It is manifest, therefore, that in passing upon this question of equal availability, the trial judge is called upon to take into account all of the attendant facts and circumstances bearing upon the situation of the witness with relation to the parties, respectively."

2 Wigmore on Evidence, 288, p.271 (3d ed., 1940, Supp. 1975).

C. The most crucial difference in the parties'relative access to Blackwell's testimony lay in his status as an admitted felon awaiting imposition of sentence. 28/ Blackwell had ample motivation

27/ continued from previous page.

clude the need for uncalled witness instructions in criminal trials. Both parties having the same power of subpoena, ex hypothesis both have the same physical access to any potential witness.

28/ The transcript of Blackwell's entry of a guilty plea contains nothing incon-

footnote continued on next page.

to testify in a manner favorable to the prosecution and harmful to petitioner, regardless of the truth. He would soon be sentenced, and the recommendation of the United States Attorney would undoubtedly influence the court. 29/

In trial counsel's words:

> I don't think he's available to me. He's got a sword hanging over his head that I can't disturb. And I think another thing we're entitled to assume here is [,] was he a devastating witness, was he somebody that would come in and at the same time nail the defendant to the wall, so to speak, the Government would have produced him. It would have tied the case up [;] if all of these people are to be believed, he

28/ continued from previous page.

sistent with petitioner's contention that there existed a Blackwell-Aguirre conspiracy respecting which petitioner was an unwitting accomplice. The transcript does contain the usual assurances that the plea has been entered voluntarily, without hope or promise of favor from the Court or the prosecutor.

29/ Unlike some prosecutor's offices, in the District of New Jersey the United States Attorney has no policy against making sentence recommendations. In fact,

footnote continued on next page.

was the one man, Mr. Blackwell now I'm dealing with particularly, he was the one man who could have come in apparently, according to all of the testimony, and made it clear that ["] I gave money to DeFalco.["] He wasn't produced. The Government may have valid reasons, but I think we're entitled to assume that one of them was he wouldn't have testified that way. And yet I couldn't have called him.

A further difference in practical availability lies in the prosecution's exclusive access to Blackwell's grand jury testimony. Only the prosecution knew what Blackwell had earlier said. Only if he were called as a prosecution witness would the defense be entitled to learn the substance of Blackwell's grand jury testimony. 30/ Thus there would be no parity of opportunity to impeach by prior inconsistent statement if Blackwell were called by the defense. See, Justice Rawlings'

29/ continued from previous page.

he recommended prolonged incarceration for petitioner, alluding to the heinous quality of the crimes. Needless to say, Blackwell was rewarded with much more lenient treatment.

30/ Jencks Act, 18 U.S.C. 3500.

dissent in State v. Parker, 261 Iowa 88, 103-04 151 NW2d 505, 514 (1967) (for the defense to call an uncalled prosecution witness without benefit of a prior deposition would be "nothing short of sheer stupidity and an indicia [sic] of incompetency.")

D. Petitioner's immediate concern is addressed to his entitlement to an uncalled witness instruction, or failing that, to a determination that the trial court prejudicially failed to exercise discretion in refusing to so instruct. Looking beyond petitioner's personal interests, this case presents the Court with an ideal vehicle for adopting the Clawans procedure 31/ in all federal cases, civil or criminal.

31/

> The better practice, however, is for the party seeking to obtain a charge encompassing such an inference to advise the trial judge and counsel out of the presence of the jury, at the close of his opponent's case, of his intent to so request and demonstrating the names or classes of available persons not called and the reasons for the conclusion that they have superior knowledge of the facts. This would accord the party accused of nonproduction the opportunity of either calling the designated witness or demonstrating to the court by argument or proof the reason for the failure to call.

State v. Clawans, 38 N.J. 162, 173, 183 A.2d 77, 82 (1962).

For that purpose, the record made in the trial court is perfect.

At the close of the prosecution case, counsel alerted the Court that he would seek an uncalled witness instruction. The prosecutor had ample opportunity to demonstrate any valid basis that might have existed for suppressing Blackwell's testimony. But at no time in the trial did the prosecution go further than assert that Restaino, supra, was controlling, and defendant could call Blackwell on his own behalf.

Adoption of the Clawans rule would remove trial attorneys from the horns of a recurring dilemma: should court time be expended on the testimony of a non-essential witness, or should the possibility of an uncalled witness instruction be risked? This Court should seize the opportunity here presented to adopt the Clawans rule in the exercise of its supervisory powers. By doing so, an unnecessary element of surprise at trial would be eliminated and judicial resources would be conserved. Most importantly the accuracy of the truth-finding function would be enhanced.

E. The uncalled witness presumption is imposed as a penalty for impairing the truth-determining ability of the jury. It is a type of penalty for unfair trial tactics: unfair to the adversary, the jury and the public interest.

In a criminal prosecution, where the burden falls on the Government to bring

forth proof of guilt, there is no easy justification for the prosecutor's withholding his strongest witness. When that witness is inexcusably withheld from the defense through the devices heretofore described, and therefore from the jury, the risk of justice miscarrying becomes unacceptably great. The writ should issue to review the second question, so that the procedures concerning uncalled witness instructions can be clarified, and the accuracy of jury fact-finding made more certain.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment and opinion of the court below.

Dated: December 24, 1976

Respectfully submitted,

EMIL OXFELD
Rothbard, Harris & Oxfeld
744 Broad Street
Newark, New Jersey 07102

FREDRIC J. GROSS
On the Petition

APPENDIX:

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1028

UNITED STATES OF AMERICA
v.
ALBERT DE FALCO, RONALD BLACKWELL,
LEONARDO ARCIERI, RONALD CHICARELLA,
CARLOS VARAS, PATRIC[E] BERGOEING

Albert DeFalco, Appellant

(D.C. Crim. No. 75-264)

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY

Submitted under 3rd Cir. Rule 12(6)
October 6, 1976

Before BIGGS, VAN DUSEN and ROSENN,
Circuit Judges

Vincent L. Verdiramo, Esq.,
Jersey City, New Jersey,
Attorney for Appellant

Jonathan L. Goldstein, U.S. Attorney; John J. Barry, Assistant U.S. Attorney; Maryanne T. Desmond, Assistant U.S. Attorney;
Newark, New Jersey,
Attorneys for Appellee

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit, that:

(1) the indictment failed to allege an offense against the United States as to a conspiracy to violate and the substantive violation of 18 U.S.C. § 912;

(2) the indictment, aside from point (1), was (a) initially insufficient for Sixth and Seventh Amendment purposes, and (b) multiplicious;

(3) Mr. DeFalco was denied the effective assistance of counsel;

(4) there was prejudicial error in the court's charge and comment on the evidence;

(5) the evidence was insufficient to withstand motions for a judgment of acquittal or for new trial;

(6) the sentence imposed went beyond the proper interest of society;

(7) the trial court's finding that Mr. DeFalco was not indigent and the imposition of the costs of trial and counsel was an abuse of discretion;

(8) Mr. DeFalco was denied a fair and impartial trial, guaranteed to him by the Sixth Amendment, by acts of prosecutorial misconduct; and

(9) the totality of error was sufficient to deny Mr. DeFalco a fair trial;

it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT:-

/s/ Francis L. VanDusen
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1028

UNITED STATES OF AMERICA

vs.

ALBERT DE FALCO, et al.,

ALBERT DE FALCO,
Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until November 7, 1976. No further stay to be granted, without prejudice to the right of appellant to proceed under 28 USC 2255, where a record may be made in the district court, or to file a petition for rehearing en banc as to issues presented on this appeal.

/s/ VanDusen
Circuit Judge

Dated: November 1, 1976

UNITED STATES CONSTITUTION:

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

TITLE EIGHTEEN, UNITED STATES CODE:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 912. Officer or employee of the United States

Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

TITLE TWENTY-EIGHT, UNITED STATES CODE:

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

BEST COPY AVAILABLE

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATE OF NEW JERSEY)
COUNTY OF ESSEX) SS

ALBERT DE FALCO of full age, being duly sworn, according to law, upon his oath deposes and says:

1. I am the appellant in the instant matter. On the 8th day of December 1975, I was convicted in the United States District Court for the District of New Jersey, of a violation of law and received a sentence of six years.

2. Thereafter, and on the 8th day of January 1976, I retained VINCENT L. VERDIRAMO, ESO., a member of the bar of the State of New Jersey, to represent me in the appeal to this Court. At no time during any of the ensuing months was I aware of the fact that Mr. Verdiramo had committed actions which would disqualify him from the practice of law, or in representing me in connection with this appeal.

3. In fact, prior thereto, and subsequent thereto, Mr. Verdiramo had committed actions and participated in actions which resulted in his indictment by a Federal grand jury. Although I learned of Mr. Verdiramo's indictment in alleging a conspiracy to commit perjury and ob-

struct justice, he informed me that the allegations were worthless, and that he would be vindicated at trial, and that the matter would not prevent him from representing me fully on my appeal. He assured me that he would prosecute the appeal vigorously, and he was confident that my conviction would be reversed. I was therefore astounded to read in the public press on September 30, 1976 that Mr. Verdiramo had pleaded guilty to one indictment, and that there were, in fact, other indictments against him which would not be prosecuted as a result of his dealings with the government. I immediately called Mr. Verdiramo on the telephone and finally reached him in Florida. I could not reach him at his office, and I could not ascertain from his office and the person who responded to my telephone call, whether Mr. Verdiramo was practicing law or not. I finally did reach him in Florida where he told me he was employed, and that my case would be coming up for oral argument on October 6, 1976. On Saturday, October 9, 1976 I read in the newspapers that my conviction had been affirmed. Thereafter, through new counsel, I was informed that on September 17, 1976, Mr. Verdiramo had been informed that the case would be submitted on briefs, and that there would be no oral argument.

4. I veritably believe that during the entire period of my appeal when Mr. Verdiramo was supposed to be representing me, he had, in fact, committed disbarable offenses; was involved in criminal acts relating to an obstruction of justice; that he deceived me constantly in violation of the attorney-client relationship. I have for the first time now read the brief submitted by Mr. Verdiramo and it does not raise many of the issues which he told me would be raised on the appeal, and I am of course unable to tell at this point whether the documents he submitted to the court were competently drawn in compliance with the Rules and whether, in fact, my appeal was honestly and legally presented to this court. I have engaged new counsel, Emil Oxfeld, of the firm of ROTHBARD, HARRIS & OXFELD in Newark and I have asked him to look into this matter. I attempted to obtain from Mr. Verdiramo's office all of the records, transcripts and papers dealing with my case to turn over to Mr. Oxfeld, but I was unable to obtain the transcripts or many other papers. I have now been informed that Mr. Oxfeld located the transcripts in the office of another lawyer.

/s/ Albert De Falco
ALBERT DE FALCO

Sworn and subscribed to
before me this 28th day
of October 1976.
/s/ Emil Oxfeld
EMIL OXFELD
An Attorney-at-Law of New Jersey

POINT I

THE INDICTMENT FAILED TO ALLEGE AN OFFENSE AGAINST THE UNITED STATES AS TO A CONSPIRACY TO VIOLATE AND THE SUBSTANTIVE VIOLATION OF 18 USC SEC. 912.

In order to determine whether an indictment, which charges a violation of 18 USC Sec. 912 and a conspiracy under 18 USC Sec. 371 to violate 18 USC Sec. 912, is valid, the Court must examine the indictment in light of the requirement of the Sixth Amendment right in all criminal matters, that the accused shall enjoy the right "...to be informed of the nature and cause of the accusation" made against him. "Procedurally this means that an indictment must set forth an offense 'with clearness, and all necessary certainty,' to appraise the accused of the crime with which he stands charged. U.S. v. Mills, 7 Pet. 138 (1833).-- Thus, it has long been recognized that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment...U.S. v. Cook, 17 Wall 168 (1872)." U.S. v. Seeger, 303 F.2d 478 (2 D Cir. 1962); Fed. Rules Cr. Proc. 7(c).

Today, liberality is the guide in testing the sufficiency of an indictment, but this is applied to matters of form and not of substance, and an indictment is not

sufficient unless it charges all the essential elements of the crime sought to be punished. U.S. v. Tornabene, 222 F.2d 875 (3d Cir. 1955); U.S. v. Krepper, 159 F.2d 958 (3d Cir. 1946) cert denied 330 U.S. 824.

In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. U.S. v. Carll, 105 U.S. 611 (1882); U.S. v. Hess, 124 U.S. 483 (1888); Hamling v. U.S. 418 U.S. 87 (1974).

The defendant-appellant, Mr. DeFalco, (hereinafter referred to solely as Mr. DeFalco), contends that two such key elements were left out of the indictment; first, an intent to defraud and the second, reliance.

Mr. DeFalco must of course concede that the words "intent to defraud" are no longer contained in 18 USC Sec. 912 after the 1948 revision of Title 18 USC., but were in the predecessor statute. The reviser's notes to 18 USC Sec. 912 states, "The words 'with intent to defraud the United States or any person,' contained in Sec. 76 of Title 18 USC 1940 ed., were omitted as meaningless in view of the United States v. Lapowich [sic.]."

Congress obviously accepted the reviser's interpretation of U.S. v. Lepowich, 318 U.S. 702 (1943).

In Lepowich, the indictment charged an "intent to defraud" as required by the then existing statutory language in the predecessor statute and the court said:

> We hold that the words "intent to defraud," in the context of this statute, do not require more than that the defendants have, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct....
>
> While more than mere deceitful attempt to affect the course of action of another is required under the second clause of the statute, which speaks of an intent to obtain a "valuable thing," the very absence of these words of limitation in the first portion of the act persuades us that, under it, a person may be defrauded although he parts with something of no measurable value at all.
>
> U.S. v. Lepowich, supra, at 704 [-05].

The only Circuit to have been faced with the problem of the omission of the words "intent to defraud" in an indictment after the revision and to decide that the reviser's interpretation of U.S. v. Lepowich, supra, was improper and that the subsequent Congressional reliance

thereon did not remove from the offense the element of an intent to defraud, was the Fifth Circuit in Honea v. U.S. 344 F.2d 798 (5th Cir. 1965) in reference to the second offense charged in 18 USC Sec. 912 and in U.S. v. Randolph, 460 F.2d 367 (5th Cir. 1972) in reference to the first offense in Sec. 912.

Referring to Randolph first, the Fifth Circuit said:

> It was our conclusion that the most unlikely meaning to assign to the deletion is that the revisers intended to overrule *Lepowitch* by re-legislation or to modify the substance of the provision.
>
> "The revisers' rather terse explanation suggests that their intent was—as is frequently done in codification-revision efforts of this kind—to make the statutory wording conform to authoritative judicial construction, and to carry forward, by a simplified and streamlined wording of the statute, the Lepowitch statement of what facts would make out a violation of the offense involved in that case." Honea v. United States, 344 F.2d at 802.
>
> The reasons which lead this court in *Honea* to conclude that "intent to defraud" was still an essential element for prosecution under part [2] of § 912 impel similar conclusion as to part [1] of § 912. The 1948 revision of the statute was generally, with a few exceptions, not intended to effect substantive

> changes in federal criminal law.[8] The revisers indicated that in § 912 they were responding to *Lepowitch* in relating the "intent to defraud" wording as "meaningless." However, *Lepowitch* did not hold that an allegation of intent to defraud was unnecessary, but instead defined the nature of the "fraud" required. Finally, there is nothing to indicate that Congress in the course of a structural recodification intended to greatly expand the scope of the statute so as to make more foolish bravado without any intent to deceive a federal felony. We now hold that "fraudulent intent", defined by the Supreme Court as the intent by artifice and deceit to cause another to follow some course he would not have pursued but for the deceitful conduct, is an essential element in a prosecution under part [1] of § 912. U.S. v. Randolph, supra, at 370, (footnotes omitted and emphasis added).

Now turning to Honea v. U.S., supra, the Fifth Circuit reviewed the Lepowich case, and the arguments raised by the defense attorneys, to which the Supreme Court responded, saying that the defendant had lumped together parts one and two of the Sec. 912. The Government position in Lepowich tried to make it clear that:

• • • the first kind of offense—[1] acting as a federal officer—could be committed without an intent to wrongfully deprive another of his property.

In reversing the District Court, the Supreme Court agreed with the Government and made it clear that its definitional statement that intent to defraud means intent to change the course of conduct was applicable only to the type [1] offense.

> "The first [1] clause of this statute, the only one under consideration here, defines one offense; the second [2] clause defines another. While *more* than mere deceitful attempt to affect the course of action of another is required under the second [2] clause of the statute, which speaks of an intent to obtain a 'valuable thing', the very absence of these words of limitation in the first [1] portion of the act persuade us that under it, a person may be defrauded although he parts with something of no measurable value at all [such as information]." 318 U.S. at 704–705, 63 S.Ct. at 916. (Emphasis supplied.)

Viewed in this light, it is obvious that the Supreme Court was not concerned with the quality or intensity of the evil which characterized the false impersonator's intent, but rather with the object upon which that intent was focused, i. e., whether the intent had to be to obtain a thing of value, or whether an intent to change the course of someone's conduct

would do. Thus the Supreme Court put no gloss on the fraudulent intent requirement where the prosecution is against one who [2] "demands or obtains" the property of another.

[9, 10] In § 76 the introductory words "intent to defraud" applied to both offenses [1] and [2] (see note 4, supra). In the quest for simplification, the Revisers apparently felt that the statute could be restructured by omitting the words which, indeed, were "meaningless" where the test for [1] "acts as such" would be acting with intent to change the course of another's conduct. This left the offense [2] subject to Court interpretation as to the precise nature of the intent required. And as to that, what the Supreme Court hinted, and what was clearly required in the statute at that time, we now hold. An intent to defraud or an intent to wrongfully deprive another of property is an essential element for a prosecution under the part [2] of § 912. Honea v. U.S., supra, at pg. 82. [sic., 802-03] (emphasis supplied).

The law frequently has read into a statute this very requirement of fraudulent intent. See Walker v. United States, 342 F.2d 22 (5th Cir. 1965), cert.denied 382 U.S. 859; White v. Levine, 40 F.2d 505 (10th Cir. 1930). "How much more is it justified when it was once formally a part of the statute and its omission

occurred in a structural recodification" and was based on a misinterpretation of a judicial ruling. Honea v. U.S., supra.

The appellee will inform this court of the reasoning in the other Circuits for not requiring an intent to defraud in the indictment, but they disregard the improper base upon which the reviser built the rephrased statute.

If the indictment had charged "with an intent to defraud" the other omitted essential element involved in 18 USC Sec. 912 could have been provided by necessary implication, i.e, the reliance by the victim of the actor on the latter's false pretense either to pursue a course of conduct he would not have pursued or gave up something of value or be subjected to a demand by one in such pretended character.

> "It is the aim of the section not merely to protect the innocent persons from actual loss through reliance upon false assumptions of Federal authority, but to maintain the general good repute and dignity of the service itself. It is inconsistent with this object, as well as with the letter of the statute, to make the question whether one who has parted with his property upon the strength of a fraudulent representation of federal

> employment has received an adequate quid pro quo in value determinative." U.S. v. Barnow, 239 U.S. 74, [80] (1915). (Emphasis supplied.)

Thus, if the victim did not believe the misrepresentations, the "good repute and dignity of the service itself" would not suffer nor would the victim have parted with anything of value. Haid v. U.S., 157 F.2d 630 (9th Cir. 1946); U.S. v. Farnham, 127 F. 478 (D.C. E.D. Pa. 1904); Ferguson v. U.S., 293 F. 361 (8th Cir. 1923). [all under the predecessor statute.]

It is interesting to note that the trial judge charged as to both of the elements referred to herein at T. 1632 lumping them together as the third essential element of the crime charged.

"The object of the indictment is first, to furnish the accused with such a description of the charge against him as well as to enable him to make his defenses,..." U.S. v. Cruikshank, 92 U.S. 542, 558 (1875); U.S. v. Debrow, 346 U.S. 374, 377 (1953); Russel v. U.S., 369 U.S. 749 (1962). In the federal courts this is most important because the accused, from virtually the beginning of our constitutional government, has had the right to plead and manage his own case. 28 USC Sec. 1654, and also in light of Faretta

v. California, 422 U.S. 806 (1975) saying that it is the accused, not counsel, who must be "informed of the nature and cause of the accusation..."

Turning now to the sufficiency of the conspiracy count and while recognizing that the Court in Wong Tai v. U.S., 273 U.S. 77 (1957) said that the offense which is the object of a conspiracy need not be delineated with the particularity necessary to support a charge premised solely upon a violation of that substantive offense. However, "indictments under the broad language of the general conspiracy statute must be scrutinized carefully...." Denis v. U.S., 384, U.S. 855 (1966). In light of the foregoing discussion of the lack of alleging essential elements required for a violation of 18 USC Sec. 912 anywhere in this indictment, this scrutinizing should be "exercised to require an assessment of the essential elements upon which the underlying offense rests...." and which is wholly in keeping with the purpose of an indictment in appraising the accused of the nature of the charges against him. Nelson v. U.S., 406 F.2d 1136 (10th Cir. 1969).

An indictment which does no more than track the language of a statute and does not allege the essential elements which are not in such statutory language, is insufficient. Russel v. U.S., supra; Hamling v. U.S., supra; U.S. v. Krepper, supra.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JOSEPH S. DAVIES, JR.,
JOHN H. BURNES, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The order of the court of appeals (Pet. App. A1-A3) is reported at 546 F. 2d 419.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1976. A petition for rehearing was denied on November 16, 1976. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to December 24, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied effective assistance of counsel on appeal.

2. Whether the district court erred in refusing to give an "uncalled witness" instruction to the jury.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiracy to defraud the Immigration and Naturalization Service by falsely representing himself as a secretary and administrative assistant to Congressman Henry Helstoski (Count I) and demanding and receiving payments from aliens illegally residing in this country to introduce private bills in the House of Representatives that would grant them permanent residence, in violation of 18 U.S.C. 912, 371, and 2 (Counts II, III, and XIV). Petitioner was sentenced to consecutive terms of three years' imprisonment on Counts II and III; to three years' imprisonment on Count XIV, to be served concurrently with the sentence on Count II; and to five years' imprisonment on Count I, to be served concurrently with the sentences on Counts II and III.[1] The court of appeals affirmed without opinion (Pet. App. A1-A3).

After the court of appeals affirmed his conviction, petitioner retained new counsel and moved to stay the judgment of the court of appeals on the ground that petitioner had been denied effective assistance of counsel on appeal. In an affidavit attached to his motion (Pet. App. A8-A10), petitioner stated that during the appeal, his attorney, Vincent Verdiramo, entered a plea of guilty to charges arising from the same activities for which petitioner had been convicted. He further stated that although he knew of

[1]Counts IV-VII and IX-XIII were dismissed at the close of the government's case. The district court subsequently granted a motion for judgment of acquittal as to Count VIII. Petitioner's co-defendants pleaded guilty prior to trial.

Verdiramo's indictment when he retained him, Verdiramo protested his innocence. Petitioner also claimed that Verdiramo had failed adequately to present issues in the brief on appeal. In response to the motion, the court of appeals stayed issuance of its judgment until November 7, 1976, "without prejudice to the right of [petitioner] to proceed under 28 U.S.C. 2255, where a record may be made in the district court, or to file a petition for rehearing en banc as to issues presented on this appeal." (Pet. App. A4). Petitioner filed a petition for rehearing setting forth the basis for his claim that he had been denied effective assistance of counsel. On November 16, 1976, the court of appeals denied the petition.

ARGUMENT

1. Petitioner contends (Pet. 24-29) that the court of appeals erred in deferring consideration of his claim that he was denied effective assistance of counsel by ruling that he could proceed under 28 U.S.C. 2255 in the district court, where an evidentiary record could be developed. Petitioner overlooks the fact that the court of appeals also permitted him to file a petition for rehearing on his claim, which he did. Under these circumstances, petitioner was not denied consideration of his contention. Indeed, in similar circumstances, this Court has afforded the same procedural relief. For example, in *Suchy* v. *United States*, 423 U.S. 1042, where a serious question of denial of assistance of counsel on appeal was presented in a petition for a writ of certiorari, this Court remanded to the court of appeals so that the petitioner could seek rehearing and the court could determine whether further briefing and argument were necessary. Here, petitioner was given the same opportunity.

Petitioner now suggests Verdiramo was caught in a conflict of interest because he was negotiating with the

government on his own behalf while representing petitioner on appeal (Pet. 24). In the first place, Verdiramo was not indicted until after submission of his brief on behalf of petitioner.[2] Since the court of appeals did not hold oral argument on the appeal, Verdiramo's representation of petitioner on appeal was complete before he was indicted. Second, petitioner's petition for rehearing filed in the court of appeals did not explain how, if at all, Verdiramo's alleged conflict abridged petitioner's right to counsel, other than to allege that "the issues arising from [petitioner's] conviction have not been presented on this appeal" (Pet. for Reh. 4).[3] The court of appeals' denial of the petition for rehearing does not warrant review by this Court, especially in light of petitioner's opportunity—expressly preserved to him by the court of appeals—to develop a full record supporting his claim at a Section 2255 hearing.

2. Petitioner also contends (Pet. 29-37) that he was entitled to an "uncalled witness" instruction because the government failed to call Ronald Blackwell, who allegedly received the cash paid by the aliens for petitioner's promises and whose testimony petitioner asserts would have been

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[2]Petitioner was convicted on December 8, 1975. On January 7, 1976, he retained Verdiramo, who filed an appellate brief on May 3, 1976. Verdiramo was indicted on June 2, 1976. On September 28, 1976, Verdiramo pleaded guilty to conspiracy to obstruct justice and to the substantive crime of obstruction of justice. On October 6, 1976, petitioner's conviction was affirmed.

[3]The affidavit for rehearing executed by petitioner's present counsel stated only that the issue on rehearing was "whether [petitioner] was denied the right of counsel * * * in that the attorney for petitioner, while presecuting [sic] this appeal, had committed actions of a criminal and disbarable nature leading to his plea of guilty in the course of his alleged representation of petitioner" (Aff. of Pet. for Reh. 2).

favorable to him. Petitioner did not raise this issue in his brief on appeal, nor did he contend in his petition for rehearing that it was an issue that should have been raised.[4] He is therefore precluded from raising it now. *Lawn* v. *United States*, 355 U.S. 339, 362-363 n. 16; *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n. 2.

In any event, the claim lacks merit. This Court has stated that a missing witness instruction is appropriate only where one party has it peculiarly within its power to call the witness. *Interstate Circuit Inc.* v. *United States*, 306 U.S. 208, 226; *Graves* v. *United States*, 150 U.S. 118, 121; *United States* v. *Restaino*, 369 F. 2d 544 (C.A. 3). In this case, Blackwell could as easily have been called by the defense as by the prosecution, and he could not be considered unavailable to the defense simply because he was awaiting sentence on another conviction and thus might have incentive to testify favorably to the prosecution. This is particularly so in light of the fact that petitioner would have been equally free to attempt to impeach adverse testimony by Blackwell if he called the witness himself as he would if Blackwell had been a prosecution witness. See Fed. R. Evid. 607.

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[4]In an affidavit appended to the petition for rehearing, petitioner's new counsel stated his belief that Verdiramo should have contended on appeal (1) that petitioner could not have been indicted for simultaneously deceiving the aliens *and* the government; (2) that a new trial was necessary because testimony of witnesses with respect to a count on which he was acquitted affected the outcome of the trial; and (3) that the indictment with respect to 18 U.S.C. 912 was defective because it failed to contain the phrase "intent to defraud." However, the appellate brief shows that each of these contentions was raised by Verdiramo (App. Br. 1-8, 9-12, 24-28) with the possible exception of the second contention, which was raised in relation to a claim that there was insufficient evidence to support the conviction.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JOSEPH S. DAVIES, JR.,
JOHN H. BURNES, JR.,
Attorneys.

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